

NTSB Order No. EA-5127

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of December, 2004

Respondent.

### OPINION AND ORDER

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

Aviation Regulations ("FAR," 14 C.F.R. Parts 61 and 91),<sup>2</sup> but reduced the suspension sought by the Administrator from 180 to 120 days. The Administrator appeals the reduction in sanction.<sup>3</sup> For the reasons given below, the appeal will be granted.

The Administrator's December 23, 2002, order, as amended, which served as the complaint before the law judge, alleged, among other facts and circumstances concerning the respondent, the following:

1. You are now, and at all relevant times mentioned herein were, the holder of Commercial Pilot Certificate No. 012447120.
2. In December 2001, you applied for a type rating for a Beech BE-300 aircraft.
3. The Boston FSDO, however, did not issue the type rating because you failed the practical test.
4. Specifically, you failed to demonstrate proficiency in the areas of emergency procedures (memory items), stall recovery procedures, and proper use of checklists.
5. Nonetheless, on January 12, 2002, you operated N301KS, a Beech BE-300, as pilot in command on a flight from Marshfield Airport, Marshfield, MA to New Bedford Regional Airport, New Bedford, MA and then back to Marshfield

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<sup>2</sup>FAR sections 61.31(a)(1) and 91.13(a) provide, in relevant part, as follows:

**§ 61.31 Type rating requirements, additional training, and authorization requirements.**

(a) *Type ratings required.* A person who acts as a pilot in command of any the following aircraft must hold a type rating for that aircraft:

- (1) Large aircraft (except lighter than air).

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>The respondent has filed a reply opposing the appeal.

Airport.

The law judge affirmed the Administrator's charges, but concluded, apparently, that respondent's violation of them was not egregious enough to support the 180-day sanction the Administrator had proposed. He therefore modified the Administrator's order to provide for a 120-day suspension.

Although the extent to which the law judge relied on them is not clear, we agree with the Administrator that several factors he discussed (violation-free record, subsequent attainment of the rating at issue, and absence of actual endangerment) have been repeatedly rejected by the Board as grounds for reducing a sanction. While we also agree that lack of knowledge of the law's requirements will not excuse a violation, it may be relevant to a judgment on sanction because an unintended violation is less serious than a willful one. In fact, the law judge appears to have accepted respondent's assertion that he mistakenly believed that an endorsement he had to take a check ride for the BE-300 type rating authorized solo flight as well.<sup>4</sup> However, whether the law judge reduced the sanction because of reliance on inappropriate factors and/or because he believed that respondent's violations resulted from a misunderstanding of the scope of an endorsement, the reduction would still have to be reversed.

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<sup>4</sup>Respondent did not advise the investigating FAA inspector of any such belief. To the contrary, the inspector testified without contradiction to the effect that respondent told her that he flew solo as a matter of convenience because someone with a type rating who was supposed to fly with him became unavailable.

The Board's authority under 49 U.S.C. § 44709(d)(3) to modify a sanction ordered by the Administrator is limited. Specifically, we are "bound by...written agency guidance available to the public relating to sanctions to be imposed" unless found by the Board to be "arbitrary, capricious, or otherwise not in accordance with law." The sanction guidance relied on by the Administrator in this case is published in her Sanction Guidance Table, FAA Order 2150.3A, Appendix 4. In Administrator v. Peacon, NTSB Order No. EA-4607 (1997), we stated unequivocally that "where the Administrator provides the law judge with an explanation as to how the recommended sanction was derived, a law judge exceeds his authority by modifying that sanction without making a finding, on the record, that the Administrator was nonetheless arbitrary or capricious in making that decision." Id. at 4. The law judge did not attempt to make such a finding here, even though the Administrator's investigating inspector explained in detail the basis for her recommendation for a 180-day suspension. Consequently, the law judge's reduction in sanction exceeded his authority.

The inspector recounted (Tr. at 35) that the suspension range in the Table for operating without a type rating was

60 to 120 days per violation. And we know that we have two violations here, that he flew to New Bedford and then he flew back. So if you take [the] mid-range as 90 days times the two occurrences, that would result in 180 days.

The inspector also explained, in effect, why she believed the suspension should be higher than the Table's minimum for such a violation:

I think it's significant that he did this deliberately, knowingly, having just failed a check ride for emergency procedures, stall recovery, check list items. I think there is a safety issue there. [<sup>5</sup>]

It may well be that the law judge, notwithstanding the evidence suggesting that respondent was well aware that he needed a type rating to fly the aircraft alone, disagreed with the assessment that respondent's violations were not the product of confusion.<sup>6</sup> He was not free to reduce the sanction for that or any other reason, however, without first finding the inspector's explanation for recommending a 180-day suspension to be arbitrary or capricious.<sup>7</sup> His failure to do so requires the reversal of his reduction of sanction and the reinstatement of the

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<sup>5</sup>The significance and degree of hazard, the airman's experience level, and compliance disposition are among the factors to be considered under the Table in arriving at an appropriate sanction. The inspector also asserted (Tr. at 35-36) that, in her opinion, the withdrawal of some less serious airworthiness allegations before the hearing should have no bearing on the sanction the Administrator sought for the egregious, willful violations. The law judge did not specifically mention the airworthiness matter in discussing sanction.

<sup>6</sup>It seems unlikely to us that respondent, an attorney and commercial pilot with 3400 hours flight time, would misapprehend the circumstances under which he could fly the BE-300 alone before actually obtaining a type rating authorizing such operation.

<sup>7</sup>The deference the statute requires the Board to accord the Administrator's choice of sanction would mean little if a law judge could ignore it without comment and substitute his own judgment whenever he simply disagreed. Indeed, the Administrator's choice is entitled to our deference whether or not it has been explained, so long as it is consistent with "written agency guidance" and is not arbitrary, capricious, or contrary to law. This is so even where, as appears to have happened here, the law judge takes issue with the Administrator's position that the violation was deliberate.

Administrator's proposed sanction.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision is reversed to the extent it modified the Administrator's order of suspension and is otherwise affirmed; and
3. The 180-day suspension of respondent's airman certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>8</sup>

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and HEALING, Member of the Board, concurred in the above opinion and order. CARMODY and HERSMAN, Members of the Board, did not concur.

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<sup>8</sup>For the purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(g).